ATTORNEY FOR APPELLANT:

LEANNA WEISSMANN
Lawrenceburg, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ELLEN H. MEILAENDER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

CHRISTIAN ELLINGER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 15A01-0701-CR-46
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DEARBORN SUPERIOR COURT
The Honorable Sally A. Blankenship, Judge
Cause No. 15D02-0607-FD-145

July 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Christian Ellinger ("Ellinger") appeals the three-year sentence imposed following his plea of guilty to Failure to Register as a Sex Offender, a Class D felony.[1]

Issue

The sole issue raised is whether the three-year sentence, defined in the sentencing order, is erroneous in light of the trial court's oral pronouncement of sentence.

Facts and Procedural History

Ellinger pleaded guilty to failure to register as a sex offender. After a sentencing hearing on August 10, 2006, the trial court found aggravating circumstances and orally sentenced him to "2 years and 1 year suspended[.]" (Tr. p. 12.) Addressing Ellinger, the court continued, "[W]e will make a sentencing order that we will provide over to you. I am not going to have all of that ready today, do you understand that sir?" (Tr. p. 13.) Ellinger answered in the affirmative.

The next day, in a proceeding designated "Judgment of Conviction," the court reminded Ellinger that he was "sentenced yesterday," advised him that she had "reduced this order to writing," and asked him to review and sign the order "so that there is full understanding." (Tr. p. 14.) The trial court told Ellinger that his sentence is "3 years with 2 years to be served in the Indiana Department of Corrections [sic] and 1 year to be suspended." (Tr. p. 15.) The sentencing order, dated August 11, 2006, reads: "The defendant shall: 1) Be sentenced to three (3) years (1095 days) with two (2) years (730

days) to be served with the Indiana Department of Corrections [sic] and one (1) years [sic] (365 days) to be suspended." Appellant's App. p. 17. Ellinger questioned the length of his sentence "because yesterday, [the trial court] said 2 years, with one year suspended." (Tr. p. 23.) The court explained:

> And I did review the tape, but what my intent was, 2 years executed with 1 year suspended. I indicated that it was going to be the aggravated sentence which would be the 3 years. . . .
>
> And I did fail to say the 3 years yesterday but the intent was 2 years executed with 1 year suspended and that's why I wanted to bring you back today so that there is complete clarification with a written order.

(Tr. pp. 23-24.) Ellinger now appeals.

Discussion and Decision

Ellinger challenges his sentence, claiming that the trial court improperly added a year imprisonment to his sentence.[2] He contends that he was sentenced twice and likens his case to Dier v. State, 524 N.E.2d 789, 790 (Ind. 1988), where our Supreme Court said, "With very little exception, a trial judge has no authority over a defendant after [she] pronounces sentence. The jurisdiction over the defendant goes to the Department of Correction." But this case is different from Dier, where the trial court resentenced a defendant five years after imposing the original sentence based upon defendant's conduct in the intervening years. Id. at 789-90. Here, on August 10th, the Court made its oral sentence pronouncement and explained that the formal order would be forthcoming. The August 11th order is not a

---

[1] Ind. Code §§ 5-2-12-5 & 5-2-12-9 (repealed effective July 1, 2006; current sex offender registration provisions at Indiana Code Sections 11-8-8-1 through 11-8-8-20.)

"second sentencing," and Dier is inapposite.

In a related argument, Ellinger claims that the oral pronouncement should control over the subsequent written order. He relies, in part, on Whatley v. State, 685 N.E.2d 48 (Ind. 1997), where our Supreme Court considered an inconsistency between an unambiguous oral sentencing statement and a subsequent abstract of judgment and chronological case summary entry that lengthened the sentence. The Court found the error was not harmless and remanded the cause to the trial court to enter judgment consistent with the oral sentencing pronouncement. Id. at 50.

We do not read Whatley as establishing a strict categorical rule. Indeed, the Court denominated two "available" approaches, either striking the sentence modification or remanding to the trial court for a proper sentencing. Id. Also, unlike Whatley, this case does not involve an unambiguous oral pronouncement and a contradictory written statement. Here, the August 10th oral statement lacked clarity. Specifically, the court orally sentenced Ellinger to "2 years and 1 year suspended[.]" (Tr. p. 12.) That could mean two years executed, and an additional year suspended, for a total of three years, or it could mean two years total, one year of which was suspended. The written order clarified that ambiguity. "The written judgment . . . is evidence which may be used to determine what sentence was intended where the oral sentence is ambiguous." Marshall v. State, 621 N.E.2d 308, 323 (Ind. 1993).

We understand how Ellinger could have focused on the word "two" in the oral

---

[2] In his brief, Ellinger also cites Indiana Appellate Rule 7(B), but he makes no claim that his sentence should

sentencing statement and, thus, misconstrued the court's intention. But the trial court explained that the oral pronouncement would be reduced to a final order, and that order clearly evidenced the court's intention of sentencing Ellinger to three years, two years of which would be served with the Indiana Department of Correction, one year of which would be suspended. Ellinger was not improperly resentenced, and he has not shown reversible error in the sentencing decision. Thus, we affirm his sentence.

Affirmed.

SHARPNACK, J., and MAY, J., concur.

---

be revised based on the nature of the offense and his character.